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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re MICHAEL G., et al., Persons Coming
Under the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF
HUMAN SERVICES,

Plaintiff and Respondent,

v.

C.B.,

Defendant and Appellant.

F063720

(Super. Ct. Nos. JD121744-00,
JD121745-00)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Jon E. Stuebbe,
Judge.

David M. Thompson, under appointment by the Court of Appeal, for Defendant
and Appellant.

Theresa A. Goldner, County Counsel, and Kelli R. Falk, Deputy County Counsel,
for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

INTRODUCTION

C.B. (mother) appeals from the juvenile court's orders denying her petition for additional reunification services pursuant to Welfare and Institutions Code section 388¹ and terminating her parental rights as to her sons, Michael G., age 7, and D.G., age 5. On appeal, mother contends the juvenile court erred in failing to consider her progress with reunification services and in failing to properly consider the minors' best interests.

PROCEDURAL AND FACTUAL HISTORY

On April 30, 2009, the Kern County Department of Human Services (department) received a referral of general neglect of mother's children. Between May 2009 and August 2009, mother tested positive at different times for the presence of cocaine, alcohol, and methamphetamine. Mother told the social worker that she was having difficulty due to the recent death of Michael and D.'s father. Mother had discussions with the social worker about the possibility of receiving voluntary family maintenance services in June and July 2009.²

On August 17, 2009, petitions were filed pursuant to section 300 on behalf of Michael and D. alleging that mother had tested positive for cocaine and alcohol multiple times.³ Mother also tested positive once for methamphetamine.⁴ As a result, the children were at substantial risk of suffering physical harm by mother's inability to provide them

¹ All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

² During visits to mother's home, the social worker noted that the children were neat and clean with no visible injuries. The children were dressed appropriately and appeared to be very bonded to mother.

³ Mother had a third child who was under the care of a legal guardian by the time the petitions were filed. That child was not involved in these dependency proceedings.

⁴ An amended petition with minor rephrasing of the allegations was filed on September 22, 2009.

proper care. At the conclusion of a detention hearing on August 18, 2009, the juvenile court ordered the children's detention. The children were placed with a relative.

At the combined jurisdiction/disposition hearing on September 29, 2009, mother submitted a waiver of rights. The court found the allegations of the petition true, by clear and convincing evidence, and declared the children to be dependents pursuant to section 300, subdivision (b). The court ordered mother to participate in services for child neglect counseling, parenting classes, mental health services, and substance abuse counseling. Mother was also ordered to abstain from drug and alcohol use and to submit to random drug testing on at least a monthly basis.

Mother failed to take drug tests three times in September and October of 2009 and those tests were considered to be presumptively positive. Mother had one positive drug test for alcohol during that same time period. Mother regularly visited the children in October 2009. The social worker learned that mother was arrested on November 1, 2009, and subsequently convicted of Penal Code section 4573.5, bringing drugs or alcohol into a state prison. Mother was sentenced to prison for 16 months. The social worker learned from prison authorities that as of March 22, 2010, mother was not participating in any prison counseling programs.

At the review hearing on March 29, 2010, the court continued the children as dependents of the court and ordered that reunification services continue for mother.

In May 2010, while still in prison, mother began mental health treatment. In June 2010, mother completed an Alcoholics Anonymous 12-step program in prison. After mother's release from prison in July 2010, the social worker met with her to review mother's case plan. Mother was given bus passes and referred to Bakersfield Adult School, Alba Counseling, Ebony Counseling, Haven Counseling Center, and to a mental health gatekeeper to help her achieve the case plan objectives. Mother began reunification services and had three negative drug tests in July and August 2010.

Mother had monthly visits with her children during her incarceration and met with them twice a week after her release from prison. Mother was enrolled and participating in a parenting class. Mother's visits with the children were reported to be consistent and of good quality. The social worker believed mother had made moderate progress toward alleviating the causes for her children's detention and her efforts to avail herself of services were acceptable. The social worker recommended additional time to receive reunification services. The review hearing on September 29, 2010, was uncontested. The court found mother had made moderate progress toward alleviating the causes of the detention and ordered further reunification services.

The social study prepared by the department for the 18-month review hearing noted that mother was residing in a drug rehabilitation center. As part of her reunification plan, mother was ordered not to use drugs or alcohol and to submit to random drug testing on a monthly basis. Mother was informed that failure to test would be deemed a positive test. Mother missed one test in October 2010, two tests in November 2010, one test in December 2010, and two tests in January 2011. All of these tests were presumed positive for drugs and/or alcohol. Mother had one excused test in December 2010.

Mother did not miss visits with her children. The visits had no documented problems and the children had positive interactions with mother and enjoyed their time with her. The children were still residing with a relative.

Although the mother met or was meeting most of the objectives of her case plan, she failed to take drug tests on six occasions at the time the social study was prepared in January 2011. The social worker concluded that mother had failed to show responsibility by proving her sobriety. The social worker recommended that mother's reunification services be terminated.

At the 18-month review hearing on February 10, 2011, mother submitted the matter on the department's recommendation. Mother's counsel stated that mother would finish her substance abuse program in four weeks and mental health services in two weeks. Mother requested to use a call-in drug testing system at her own expense. The court found the mother made minimally acceptable progress in her case plan, minimally availed herself of services, and return of the children to her custody would create a substantial risk of detriment to the children's safety and physical or emotional well-being. The court terminated mother's reunification services.

Section 388 Petition

On April 11, 2011, mother filed a section 388 petition seeking a change in the court's order removing the children from her custody. Mother stated that she completed her parenting program at Alba Counseling Center, participated in mental health and substance abuse counseling, and visited with her children on a regular basis.

A social study prepared by the department in May 2011 stated that mother only visited the children 13 out of 91 possible visits. A supplemental social study prepared in June 2011, however, stated that the relative caregiver reported that mother consistently visited the children during the six months after she was released from prison. A supplemental social study report prepared in October 2011 indicated that there was not a set day and time for mother's visits, but mother did visit the children "off and on."

The mother did call and inquire about the children. The mother's visits with the children after September 2011 were in the nature of mother showing up unexpectedly where the caregiver happened to be with the children. As of early October 2011, mother had not scheduled visits with the children. Because of mother's inconsistent visitation, she was unable to continue to build a healthy relationship with the children. Due to the children being out of mother's care, they showed no emotional attachment to mother as their primary caregiver. When asked how they would feel if they were placed in another

home and could not see their mother, the children agreed that they would like to know how mother was doing but they would be alright with a move to a new home. The children did not look to mother for their daily emotional or physical needs.⁵

Mother had completed most of the elements of her case plan with the exception of her ongoing problems with substance abuse. Mother had to reenroll into a substance abuse program on May 20, 2011, and was due to complete the six-month program in November 2011.

Between February 2011 and July 2011, mother had four negative drug and alcohol tests and one excused test. During the same time frame, mother had eight presumptively failed drug tests for her failure to test, two positive tests for alcohol, and one positive test for cocaine. Mother twice violated her parole by testing positive for cocaine and failing to enroll in a parole-referred substance abuse program. Mother was not employed and was receiving supplemental security income (SSI) for drug and alcohol dependency.

The hearing on mother's section 388 petition and the section 366.26 hearing was conducted on November 1, 2011. Mother argued that she had made sufficient progress that the children would be safe in her custody. The department argued there had been no change in circumstances for the children to be safe in mother's custody, because mother failed to abstain from drugs and alcohol. The court denied mother's section 388 petition and denied mother's motion for a continuance. The court found clear and convincing evidence that the children were adoptable, selected adoption as the permanent plan, and terminated mother's parental rights.

⁵ The children's relative caregiver was unwilling or unable to adopt or to obtain legal guardianship for the children. Michael and D. were, respectively, age six and age five and were both healthy with no developmental delays or display of mental health problems. The department located an adoptive home. The children had been visiting the prospective adoptive family. The visits were going well and the family was committed to adopting both Michael and D.

DISCUSSION

Mother contends there was substantial evidence of a change of circumstances to support her petition for continued reunification services and that it would be in Michael and D.'s best interests to resume efforts to reunify with her. We disagree.

It is mother's burden of proof to show there was new evidence or there were changed circumstances that made a change of the children's placement in their best interests. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)) The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415 (*Jasmon O.*)) The petition must be liberally construed in favor of its sufficiency. (*Ibid.*)

The mandate for liberal construction of a section 388 petition, however, does not entitle a petitioner to avoid describing the changed circumstances or new evidence. Section 388 and the pertinent rule of court (Cal. Rules of Court, rule 5.570) require the petition to allege changed circumstances or new evidence that requires changing a prior order. (*Jasmon O.*, *supra*, 8 Cal.4th at p. 415.) As the moving party, it was mother's burden of proof, by a preponderance of the evidence, to show there was new evidence or there were changed circumstances that called for a change of the previous order denying reunification and that reunification services would be in the children's best interests. (§ 388; *Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Mother's petition was very weak, but the juvenile court nevertheless gave mother a hearing based on the petition.

The parent bears the burden of showing, in a section 388 petition, both a change of circumstance exists *and* that the proposed change is in the best interests of the child. A petition only alleging changed circumstances, which would lead to a delay in the selection of a permanent home, to see if a parent could eventually reunify with a child at

some future point, does not promote stability for the child or the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Mother argues there was no evidence that her conduct was a danger, or that it ever posed a danger, to her children. Mother also argues that she continued drug testing after reunification services were terminated. We agree with respondent that mother never contested the detention, jurisdictional and dispositional findings of the juvenile court on the issue that her drug and alcohol use did not cause harm to her children.

In fact, mother submitted her case on the department's social studies and reports. Mother received reunification services for 18 months before those services were terminated. Mother's failure to raise this issue to the juvenile court, or to this court, when the jurisdiction and disposition orders were originally appealable, constitutes a forfeiture of the factual point she is making in this appeal. An unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order. (*In re A.C.* (2008) 166 Cal.App.4th 146, 155-156; *In re Janee J.* (1999) 74 Cal.App.4th 198, 209; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151.)

Mother continued to struggle with drug and alcohol addiction throughout the proceedings, and was presumptively positive for drugs and/or alcohol late in the proceedings well after reunification services were terminated. We further note that mother's section 388 petition did not raise the issue that she never harmed her children due to her drug and alcohol addictions.

Mother further ignores evidence that she failed to establish a strong bond with the children even after she was released from prison. Late in the proceedings, mother's visits with the children took on a random, inconsistent quality, and were rarely, if ever, scheduled. Mother was unable to build a healthy relationship with the children and the children did not show an emotional bond to mother as their primary caregiver. The children told the social worker that they wanted to know how their mother was doing, but

they were alright with being moved into a new home. Under these circumstances, mother failed to show changed circumstances. Mother further failed to demonstrate to the juvenile court, or in this appeal, how it was in her children's best interests for them to be returned to her custody.

To understand the element of best interests in the context of a section 388 petition, we look to the Supreme Court's decision in *Stephanie M.* After the termination of reunification services, a parent's interest in the care, custody, and companionship of his or her child is no longer paramount. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) Rather, the focus shifts, once reunification efforts end, to the child's needs for permanency and stability; there is in fact a rebuttable presumption that continued out-of-home care is in the best interest of the child. (*Ibid.*) A court conducting a modification hearing at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child. (*Ibid.*)

Notably, both here and in the juvenile court, mother ignores Michael and D.'s need for permanence and stability in advocating her position. Neither the juvenile court nor this court, however, may do so.

DISPOSITION

The juvenile court's orders denying mother's section 388 petition and terminating her parental rights are affirmed.